No. 92-47

Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MICHIGAN

Petitioner,

vs

JOSEPH THOMAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

JEFFREY CAMINSKY P 27258
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5846

QUESTIONS PRESENTED

DOES THE DOCTRINE OF "INEVITABLE DISCOVERY" APPLY TO A DEFENDANT'S STATEMENTS, AS WELL AS PHYSICAL EVIDENCE?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....1

INDEX OF AUTHORITIES.....3

OPINIONS BELOW.....5

STATEMENT OF JURISDICITION.....6

CONSTITUTIONAL PROVISIONS INVOLVED.....7

STATEMENT OF THE CASE.....8

REASONS FOR GRANTING THE WRIT.....15

CONCLUSION.....21

APPENDICES:

"A" Opinion of the Michigan Court of Appeals

"B" Order of the Michigan Court of Appeals denying Rehearing

"C" Order of the Michigan Supreme Court denying leave to appeal

INDEX OF AUTHORITIES

CASE PAGE

Arizona v Fulminante,
___ US ___; 111 S Ct 1246;
___ L Ed 2d ___ (1991).....21

New York v Harris,
495 US ___; 110 S Ct ___;
109 L Ed 2d 13 (1990).....21

Nix v Williams,
467 US 431; 104 S Ct 2501;
81 L Ed 2d 377 (1984).....17

Unger v State,
640 P2d 151 (Alas App, 1092).....17

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MICHIGAN

Petitioner,

vs.

JOSEPH THOMAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on October 21, 1991, rehearing denied January 6, 1992, leave to appeal denied by the Michigan Supreme Court on April 8, 1992, one justice dissenting.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 191 Mich App 576; ___ NW2d ___ (1991), and appended below as Appendix A; the order of the Court of Appeals denying rehearing is unreported, and appended below as Appendix B; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 439 Mich 974 (1992), and appended below as Appendix C.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its opinion on October 21, 1992, and denied rehearing on January 6, 1992; the Michigan Supreme Court denied leave to appeal on April 8, 1992. This Court's jurisdiction is invoked under 28 USC 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 12, 1975, following jury selection in their trial for first-degree murder, Respondent and his two co-defendants pleaded guilty to second-degree murder. On March 19, 1975, the trial court sentenced Respondent to concurrent prison terms of 40-to-100 years imprisonment. Respondent made no motion to suppress any evidence prior to his guilty plea.

Following several unsuccessful state court appeals, on July 7, 1986, a federal judge granted Respondent's petition for writ of habeas corpus, and ordered that he be granted a new trial. Docket No. 84-CV-4740-DT. On May 1, 1987, a divided Sixth Circuit Court of Appeals affirmed the granting of the writ. Docket No. 86-1706; 818 F2d 476 (CA 6, 1987). On October 5, 1987, the United States Supreme Court denied

the State's petition for writ of certiorari. Docket No. 87-89.

Prior to trial, Respondent moved to suppress certain physical evidence taken upon his arrest, together with statements given made to police on his way to the police station, claiming that the police lacked probable cause to arrest him. Testimony at the evidentiary hearing showed that informants and other "street sources" and "various other people" had told the police that someone with the street name "Hassen," who lived on Woodlawn was involved in the homicide. The arresting officer also testified that he had seen a teletype giving the names of three suspects for him to arrest, and that Respondent -- Joseph Hassen Thomas, of 8819 Woodlawn -- was one of the three. Furthermore, the police file contained a photograph of Respondent. The police then proceeded to arrest Respondent

in his home, having been admitted into the home by his mother.

In the process of arresting him, the police discovered a loaded .38 caliber revolver in his blanket. Respondent also made a statement in the squad car on the way to the police station, admitting his presence at the scene of the crime. Both were later admitted into evidence at trial.

During argument on the motion to suppress, the prosecutor claimed that the police had probable cause to arrest Respondent at the time, and that even if this were not so, the police were actively pursuing other leads that would have led inevitably to his arrest. The prosecutor also voiced objection to the fact that the Respondent had not raised the point in a timely fashion, prior to his 197 guilty plea.

At the conclusion of the evidentiary hearing, the trial court made the following ruling:

> "[U]nder the circumstances of this case, I'm going to rule with the Prosecution. I do not feel that in doing so, due process has been denied...in any respect. The arrest may... -- and I'm not saying that it was, but I think the best thing that one can say, it was a bit premature, if that can be said with any degree of accuracy.
>
> * * *
>
> "It seems to be that...I think the Prosecutor's right, it would have been done anyhow. And it seems to me that some consideration needs to be given to the fact that in this case all state remedies were exhausted, and in the federal courts it was return on the grounds of...ineffective assistance of counsel....
>
> * * *
>
> "No, I'm going to hold that the arrest was legal, valid.
>
> * * *
>
> "And the testimony is that Defendant had been advised of his rights by Officer Love. There's nothing in the record that would indicate that it was anything but voluntary. So your motion as it

> relates to the suppression of the statements...[and] to the legality of the arrest is denied. I'm holding tat the arrest was legal and the subsequent statements that I've heard on this record...are admissible."

During the course of trial, the prosecution introduced evidence that Respondent's fingerprints were found on a television set belonging to the victims, and found next door to the victim's house. Papers belonging to one of the victim's was found in a trash bag, also next door to the victims. Respondent was cradling a loaded .38 revolver at the time of his arrest. Blood stains matching one of the victim's was found on Respondent's coat, and hairs found on Respondent's shoes matched those from the other victim. Respondent's half-sister testified that she had seen Respondent and others in the house next door to the victim's on the evening of the murders, and that he (Respondent) was armed with a gun. A witness who lived next door

testified that on the night of the murders, Respondent and two others left the house -- she heard several gunshots -- and then the three men returned, each with a gun. One of the three men then said: "He saw me," "where are my bullets," and "I've got to go back." Then, all three men left again, and when then returned each again had a gun. (V, 674-675). Other testimony established that upon his arrest, Respondent stated that he had been at the victim's house but that "they" had done the shooting, and that this statement was essentially repeated at the police station.

On June 15, 1988, a Detroit Recorder's Court jury convicted Respondent of two counts of first-degree murder. On July 19, 1988, Respondent was sentenced to concurrent terms of life in prison without parole.

On October 21, 1991, the Court of Appeals reversed Respondent's conviction in

a published opinion, and remanded the cause for retrial. Docket No. 111910. The Court concluded that Respondent's arrest was unlawful, and that while the doctrine of "inevitable discovery" permitted the prosecution's use of physical evidence seized from Respondent's home and person, the doctrine did not extend so far as to permit the use of his statements. The Court also rejected Petitioner's claim that Respondent's failure to raise the matter in timely fashion, during his initial appeal of right, waived any challenge to his arrest.

Petitioner seeks now seeks certiorari.

REASONS FOR GRANTING THE WRIT

This case gives the Court the chance to review a novel question, concerning application of the "inevitable discovery" rule. For a variety of reasons, Petitioner submits that the Michigan Court of Appeals erred in its resolution of both issues, and that this Court should intervene to delineate the proper standard of review -- and to correct a mistake occasioned by the untimely intervention of a federal court in the matter.

A.

THE COURT OF APPEALS ERRED IN FINDING THE DOCTRINE OF "INEVITABLE DISCOVERY" INAPPLICABLE TO A DEFENDANT'S CONFESSION.

In its opinion, the Court of Appeals found that the police arrested Respondent before they had obtained probable cause.[1]

---

1 Petitioner disputes the notion that the

Recognizing that the police were developing abundant leads which justified his detention within a matter of hours, the Court rejected Respondent's claim that certain items seized from his home were obtained unlawfully, on the strength of this Court's holding in Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984). However, citing an Alaska Decision that predated the holding in Nix,[2] the Court also held that

---

1 Continued
police arrested Respondent without probable cause to do so. However, given the fact that the State court of appeals permitted Respondent to raise the matter after the Federal courts overturned his conviction -- well after the time for raising the matter in a timely fashion, and after most of the evidence surrounding the circumstances of his arrest had vanished with the fading memories of the witnesses -- this aspect of the case is not before the Court.

2 In Unger v State, 640 P2d 151 (Alas App, 1092), the Alaska Court of Appeals rejected the notion that a defendant's confession could be regarded as "inevitable." However, the court looked to whether "the government undoubtedly would have discovered the tainted evidence by lawful means," Unger, at 158, rather than the "preponderance of the evidence" test this Court adopted in Nix. In addition, the Alaska prosecutor conceded

the doctrine had no general application to a defendant's admissions, and ordered Respondent tried because of the admission to the arresting officers on the way back to the police station.

In Nix, this Court held that -- even assuming police violate the Fourth Amendment in obtaining evidence -- when they prosecution can demonstrate "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," Nix, at 444, then the deterrence rationale of the

---

2 Continued
the point away, basing his argument on police "good faith" instead.

Even so, the Unger court -- along with courts in other cited cases -- all looked to the evidence to determine the point. They did not reject the notion of inevitable discovery in the context of confessions -- nor look to a lack of evidence on the existing record, stemming from the fact that the trial court rejected the claim of unlawful arrest in the first place, as did the Michigan Court of Appeals.

exclusionary rule evaporates, and a court should admit the evidence. "Anything less," Chief Justice Burger wrote for the majority in Nix, "would reject logic, experience, and common sense." Ibid.

As the facts in this case show that Respondent's arrest was only a matter of time, the conclusion that his statement was in any way related to the premature nature of the arrest is entirely speculative: as Respondent freely confessed his involvement in the murder upon his arrest, it is likely that he would have done so at any time following the initiation of custody. It is, after all, unlikely that a suspect's motivation to speak will be greatly affected by the timing of his arrest; many confessions stem from conscience, many others from a hope to minimize one's criminal exposure -- and neither motivation

is affected by the timing of the arrest. Moreover, given the loss of critical evidence on the point due to Respondent's failure to raise the matter in a timely fashion, the conclusion that the State actually violated his constitutional rights is entirely speculative -- the conclusion that Respondent would have remained silent if arrested subsequently is entirely speculative -- yet the loss of evidence is painfully real. And in the absence of a demonstrable causal nexus between the taint and the evidence obtained, there is nothing to be gained by excluding the evidence; and, under the circumstances, the trial court acted within its constitutional prerogatives in declining to exclude the evidence.

Even if this Court chooses to limit its attention to the application of the inevitable discovery, this Court would find the instant case well worth its

attention.[3] Accordingly, Petitioner requests this Court to grant the petition, and review the holding of the Court of Appeals.

---

[3] Petitioner also notes that, given the overwhelming nature of the proofs -- and the virtually identical statement Respondent gave in the basement of police headquarters -- any error in admitting the initial statement was harmless error. See, eg, New York v Harris, 495 US ___; 110 S Ct ___; 109 L Ed 2d 13 (1990); Arizona v Fulminante, ___ US ___; 111 S Ct 1246; ___ L Ed 2d ___ (1991).

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and reinstate Respondent's conviction for first-degree murder.

JOHN D. O'HAIR
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

JEFFREY CAMINSKY
Assistant Prosecuting Attorney
1204 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: (313) 224-5846

Dated: June 11, 1992
JC/eb

APPENDICES "A"

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

October 21, 1991
9:25 a.m.
FOR PUBLICATION

NO. 111910

JOSEPH THOMAS,

Defendant-Appellant.

Before: Gillis, P.J., and Sawyer and Reilly, J.J.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree felony murder. MCL 750.316; MSA 28.548. He was sentenced on his convictions to serve life in prison. He now appeals and we reverse.

The murders which give the rise to defendant's convictions occurred on December 6, 1974. Defendant was charged in those murders shortly after their commission and pled guilty to two counts of second-degree

murder on March 12, 1975, and was sentenced to serve forty to one hundred years in prison on each count. Following various unsuccessful appeals to this Court and the Supreme Court and an attempt to withdraw his guilty plea in the trial court, defendant was able to obtain habeas corpus relief in 1987, resulting in the withdrawal of his guilty plea and his trial on the instant charges. A trial was conducted in July 1988, resulting in defendant's instant convictions.

Defendant raises a number of issues on appeal, one of which is dispositive. Defendant argues that his initial arrest was unlawful and, therefore, certain physical evidence seized following his arrest as well as statements made by defendant to the police following his arrest should have been suppressed. We agree that defendant was unlawfully arrested and that the statements made by him to the police following that

arrest should have been suppressed, but do not agree with defendant that the physical evidence should have been suppressed.

The police arrested defendant at this residence without a warrant. Defendant argues that the police lacked probable cause to make an arrest. We agree. A police officer may arrest without a warrant if he has reasonable (or probable) cause to believe that a felony has been committed and that the suspect committed the felony. MCL 764.15; MSA 28.874. Probable cause to arrest exists if the facts are available to the officer at the moment of arrest would justify a fair minded person of average intelligence to believe that the suspected person has committed a felony. People v Oliver, 417 Mich 366, 374; 338 NW2d 167 (1983). The only facts known to the police at the time of defendant's arrest concerning defendant's involvement in the murders were that an unnamed street source of one of the

officers had said that the "word on the street" was that an individual named "Hassen" living on the same street as defendant was involved in the murders, that defendant's middle name is Hassen, and that defendant was wanted for questioning in the case because of his known association with two other suspects in the murders, General Dorsey and Jeffrey Dorsey (a neighbor of the victims).

This evidence does not establish probable cause to make an arrest. The mere fact that defendant is a known associate of two suspects in the killing, while perhaps grounds to make defendant also a suspect, does little to establish defendant's involvement in the murder. Further, the fact that an unidentified informant told an officer that the "word on the street" was that an individual with the same name as defendant's middle name was involved in the crime also fails to establish probable cause. First, the officer declined to

identify his source, and did little to establish the source's credibility other than pointing out that the source was not in custody at the time of supplying the information, nor was there any evidence to corroborate the accuracy of the source's information. Indeed, the officer's testimony was that the source told him that the "word on the street" was that a person by the name of Hassen who lived on the same street as defendant was involved in the murder. There is no indication that the source spoke from personal knowledge that Hassen was involved in the murder. Rather, the source merely indicated that he had heard that Hassen was involved, from individuals who apparently were not even identified to the police officer, let alone whose identities were divulged in court.

Rumor and a known association with other suspects in a case, while certainly justifying investigation by the police into

an individual's involvement in a crime, do not establish probable cause to believe that the person was involved in the commission of the offense. See Oliver, supra at 366 (to establish probable cause based upon information is reliable and that the information is based on something more substantial than casual rumor). Accordingly, we conclude that the trial court clearly erred in finding that probable cause existed to arrest defendant.[2]

The prosecutor also appears to argue that the statements made by defendant following his arrest as well as the physical evidence recovered in connection with defendant's arrest are admissible under the inevitable discovery exception to the exclusionary rule.[3] While the evidence obtained as a result of defendant's unlawful arrest would normally be suppressed under the fruit of the poisonous tree doctrine, it may nevertheless be admissible if the

prosecution can show that the same evidence would have been inevitably discovered despite the unlawful police conduct which results in the application of the exclusionary rule. Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

Nix represents the second time that that case was before the Supreme Court. In an earlier opinion in the case, Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), the Supreme Court granted Williams a new trial, concluding that his right to counsel had been violated. In Brewer, a ten-year-old girl had been murdered and Williams had been arrested for that murder prior to the discovery of the body. While transporting Williams from the place of arrest back to Des Moines, where the abduction had occurred, one of the officers gave Williams what has become known as the "Christian burial speech." The officer pointed out to Williams that a snow storm was coming which would make it

impossible to find the body and that the parents of the victim should be entitled to a Christian burial for their daughter who had been abducted on Christmas Eve and murdered. As a result of the speech, Williams directed the officers to the body. Having concluded that the conduct of the officers violated Williams' right to counsel, the Supreme Court concluded that incriminating statements themselves, as well as any testimony by the police concerning the fact that Williams had led them to the body, could not be admitted into evidence.

The Court, however, left open the question whether evidence of where the body was found as well as the condition of the body could be admitted on the theory that the body would have been discovered in any event. Id. at 406, n 12. On retrial, the state trial court found that the body would have inevitably been discovered and allowed the evidence of the discovery of the body and condition of the body at trial.

Ultimately, the United States Supreme Court concurred in this conclusion in Nix, concluding that the body would have inevitably been discovered based upon the fact that an intensive search for the body was in place approximately 2-1/2 miles from where the body was, proceeding to the area where the body was located.

In the case at bar, the prosecutor suggests, and the trial court had concluded, that defendant inevitably would have been arrested based upon evidence which was developed by the police following defendant's arrest and independent of defendant's arrest. Specifically, the police obtained statements from witnesses that placed defendant in the area of the homicide at sometime before the homicide and fingerprint analysis of latent prints recovered from property stolen from the victim's house matched defendant's fingerprints, with the police having possession of a fingerprint card for

defendant from a prior arrest. We agree that this evidence, combined with the knowledge the police already had concerning defendant's known involvement with the Dorsey brothers and the information obtained by the street informant, would yield probable cause to have arrested defendant at the subsequent time. Similarly, we are satisfied that a search would have been conducted at that subsequent time which would have yield the physical evidence obtained. Accordingly, the inevitable discovery doctrine can be applied to justify the admission into evidence of the physical evidence seized at the time of defendant's arrest and subsequent to that arrest. To this extent, the trial court's decision was not clearly erroneous. People v Martinez, 187 Mich App 160, 171; 466 NW2d 380 (1991).

This, however, does not resolve the question whether defendant's statements to the police should have been suppressed from evidence. The prosecutor cites no case in

which the inevitable discovery doctrine has been applied to a defendant's statements.[4] On the other hand,, defendant has cited no case in which the application of the inevitable discovery doctrine to statements has been considered. Our own research of the issue did not reveal any Michigan cases which have addressed this issue, and few cases from foreign jurisdictions as well. The only case which we have discovered which squarely addr sses the issue is Unger v State, 640 P2d 151 (Alas App, 1982). In Unger, the Alaska Court of Appeals noted that "a confession cannot normally be considered the type of evidence that inevitably will be 'discovered' by legal, predictable police procedures." Id. at 159. Indeed, the Alaska court noted that the inevitable discovery doctrine permits the state to introduce evidence that is the result of an illegal search or seizure upon a showing that the government would undoubtedly have discovered the tainted

evidence by law means, citing Kamisar, LaFave & Israel, Modern Criminal Procedure (4th ed, 1974), p 702. Unger, supra at 158.

Also of interest in State v McKendall, 36 Or App 187; 584 P2d 316 (1978), which was relied upon in part by the Unger court, wherein the Oregon Court of Appeals declined to apply the inevitable discovery doctrine to the admission of a confession. Although the court did not explicitly state that the inevitable discovery doctrine does not apply to confessions, the court did note that there was nothing in the record to support a finding that the defendant's statement inevitably would have been made and, therefore the exception did not apply. Id. at __; 584 P2d 320. Similarly, in State v Anderson, 160 Wis App 2d 307; 466 NW2d 201 (1991), the Wisconsin Court of Appeals rejected the application of the inevitable discovery doctrine to find a confession admissible, but again did so on the basis that the facts did not support a finding of

inevitable discovery without direct consideration of the question whether the inevitable discovery doctrine applies to confessions. This was also the result in an earlier Oregon Court of Appeals decision, State v Paz, 31 or App 851; 572 P2d 11036 (1977), in which the court concluded that the defendant's statements would not inevitably have been discovered and, therefore, should not have been admitted. The court did not, however, address the threshold question of whether the inevitable discovery doctrine is applicable to confessions or other statements by a defendant.

We agree with the Alaska court that the inevitable discovery doctrine cannot ordinarily be applied to justify the admission into evidence of a tainted confession. Even through it can be shown that defendant would eventually have been arrested, that does not lead to the conclusion that it is inevitable, without

speculation, that defendant would have made the same statements to the police that he did in fact make following his unlawful arrest. It is simply too speculative to conclude that, following the passage of some time, defendant would necessarily have made the same statements to the police that he made initially. Defendant may have learned of the arrest of the Dorsey brothers and, with time to reflect, have consulted counsel who would have advised him to remain silent, or on his own considered the possibility of being arrested and the need to remain silent, and, for that matter, the manner in which the arrest was conducted could impact on defendant's willingness to make a statement. See Unger, supra at __; 640 P2d 159. To conclude that a person would make the same statement under different fact situations requires, in essence, both the ability to read the defendant's mind to ascertain why he was willing to make the statement in the first place and a degree of

prognostication concerning whether th willingness would extend to a different fa situation which would ordinarily be beyo the power of either the prosecutor or t court to perform.

We stop short, however, of saying th the inevitable discovery doctrine can nev be applied to justify the admission of statement by the defendant as we allow the possibility that some such fa situation would be rather unusual and wou involve unique factual situations. In a event, the prosecutor has made no showing this case that there is any reason believe that defendant would inevitably ha made the same statements following subsequent lawful arrest made sometime af the unlawful arrest in the case at ba Accordingly, we conclude that the tri clearly erred in failing to suppress evidence statements made by defenda following his arrest.[6]

For the above reasons, we conclude that the trial court erred in denying the suppression of defendant's statements. Therefore, defendant is entitled to a new trial.[7]

One other issue raised by defendant merits brief consideration as it affects the question whether retrial is appropriate. Defendant argues that the prosector lacked the authority to retry defendant on the first-degree charge in light of his earlier plea to second-degree murder. Defendant is correct that the Supreme Court in 1973 adopted a rule that a defendant who pleads guilty to a lesser-included offense and later has the plea set aside may not be tried on a greater offense than that to which he pled. People v McMiller, 389 Mich 425; 208 NW2d 451 (1973). The McMiller rule was reaffirmed by the Court in People v Thornton, 403 Mich 389; 269 NW2d 192 (1978). However, the Supreme Court abandoned the McMiller rule by its adoption

of GCR 1963, 785.(7)(d), effective March 1, 1984, which provides that if a defendant elects to withdraw a plea, the case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered. See 418 Mich lxxxvi. That provision may now be found in MCR 6.312, the staff note to which recognizes that the court rule removes the prohibitions established by McMiller and Thornton. Michigan Court Rule 6.312, Note, R 63-7. Although McMiller was in effect at the time defendant tendered his original guilty plea, it had been abandoned prior to the time defendant obtained habeas corpus relief and was retried on the first-degree murder charges. Accordingly, we conclude that defendant was subject to retrial on the higher charge, the McMiller rule no longer being applicable.

Defendant also raises two issues in a supplemental brief filed in propria persona.

In light of our resolution of the first issue, we need not consider the issues raised in that brief.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ John H. Gillis

/s/ David H. Sayer

/s/ Maureen Pulte Reilly

[1] A search of Jeffrey Dorsey's home earlier in the day of defendant's arrest had revealed property missing from the victim's home.

[2] We also note, though not argued by the parties, that even the existence of probable cause would not alone justify defendant's arrest since he was arrested in his residence without a warrant. Absent exigent circumstances, the police must possess an arrest warrant before entering a suspect's residence to effect an arrest. Oliver, supra at 376, citing Payton v New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). We do note that the police were granted admittance to defendant's house by his mother, with whom defendant apparently lived, but we do not speculate on whether the mother's permission to enter the house

was sufficient to justify arresting defendant in his residence without a warrant.

[3] The prosecutor's brief spends exactly one sentence on this issue, asserting that defendant's arrest was inevitable. Additionally, the trial court in ruling on this issue did not that "it [the arrest] would have been done anyhow." While we address this issue, appellate review was certainly not enhanced by the prosecutor's failure to more fully develop his argument in this area.

[4] In fact, the only inevitable discovery case cited by the prosecutor is Nix, supra, which, of course, concerned the inevitable discovery of physical evidence.

[5] For example, had, unknown to the arresting officers, another officer in the department obtained a warrant for defendant's arrest and arrived at defendant's residence moments after the warrantless arrest was conducted, it might be valid to conclude that there is not reasonable distinction between the arrest without a warrant and an arrest a few moments later with the warrant and, therefore, any statement made by defendant subsequent to the arrival of the warrant would be admissible. Obviously, this is a rather unique fact situation and certainly is not the case presented here.

[6] We do note that this does not preclude the proof of the facts contained within the statement from sources other than the statement itself. See McKendall, supra at ___; 584 P2d 320. Indeed, this is the

result obtained in Brewer and Nix, with the statements by Williams being suppressed from evidence, but the content of those statements, the location of the victim's body, being admission through other evidence.

[7] We briefly consider the prosecutor's argument that defendant has waived consideration of this issue by not having timely raised it a the time of his original plea. The prosecutor's argument in this regard is wholly without merit. The case primarily relied upon by the prosecutor in support of this argument, People v Brady, 139 Mich App 688; 363 NW2d 8 (1984), is simply not on point. In Brady, the defendant sought a series of appeals and motions for new trial from the same conviction, raising his issues piecemeal rather than in the same proceeding. In the case at bar, this matter is before us on defendant's direct appeal from his conviction. Moreover, the issue of the lawfulness of defendant's arrest did not arise at a prior trial inasmuch as no prior trial had been conducted, since defendant's prior conviction was obtained by plea. The other cases cited by the prosecutor in support of this argument are similarly not on point, involving the requirement that an objection be made at trial in order to preserve an issue for appeal as well as the law-of-the-case doctrine, neither of which are applicable to this case. Defendant did preserve the issue of the lawfulness of his arrest at trial and the lawfulness of defendant's arrest or the need to suppress evidence derived from the unlawful arrest. The prosecutor's position might have some merit had defendant's prior conviction followed a trial and defendant took an appeal from that conviction and did not

challenge the lawfulness of his arrest or the admission of the evidence obtained from that arrest. In such a circumstance, it might be appropriate to conclude that defendant waived the issue in further proceedings of the case if a reversal had been obtained on other grounds. See, e.g., VanderWall v Midkiff, 186 Mich App 191; 463 NW2d 219 (1990).

APPENDICES "B"

Court of Appeals, State of Michigan

ORDER

People of Michigan v Joseph Thomas

JOHN H. GILLIS
Presiding Judge

Docket # 111910 David H. Sawyer

L.C. # 74-009753 Maureen Pulte Reilly
Judges

The Court orders that the motion for rehearing is DENIED.

J. H. Gillis

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on

(SEAL)

Jan 6 1992
Date

Daniel F. Walsh
Chief Clerk

APPENDICES "C"

Order

Michigan Supreme Court
Lansing, Michigan

Entered: April 8, 1992

93099

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 93099
COA: 111910
LC: 74-09753

JOSEPH THOMAS,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Boyle, J., would grant leave to appeal.

20402

CORBIN R. DAVIS, Clerk of the Michigan Supreme Court.

(SEAL)

April 8, 1992 Corbin R. Davis

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SEP 28 PAGE 65

No. 92-47 (2)

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1992

DISTRIBUTED
SEP 17 1992

RECEIVED
SEP 15 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF MICHIGAN

Petitioner,

vs

JOSEPH THOMAS

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

Joseph Thomas
#140849
P.O. Box E
Jackson, Michigan 49204

723

41PP

No. 92-47

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1992

STATE OF MICHIGAN

Petitioner,

vs

JOSEPH THOMAS

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Joseph Thomas, who is now held in a Michigan State Prison ask leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 39.

The respondent's affidavit in support of this motion is attached hereto.

Joseph Thomas

Joseph Thomas
#140849
P.O. Box E
Jackson, Michigan 49204

Date: 7-14-92

AFFIDAVIT IN SUPPORT MOTION FOR LEAVE TO PROC. IN FORMA PAUPERIS

I, Joseph Thomas being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes---- No-✓---
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.
   My last employment was with Michigan State Industries I haven't had a job since December 27, 1989

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes---- No -✓--
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ---- No -✓--
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ---- No -✓---
   a. If the answer is yes, describe the property and state its approximate value.

RECEIVED
SEP 01 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
AUG 7 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: /s/ Joseph Thomas

No._____

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1992

STATE OF MICHIGAN

Petitioner,

vs

JOSEPH THOMAS

Respondent.

PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of prejury that a true copy of the Motion to proceed in forma pauperis, Affidavit in Support, Proof of Service, and Brief in Opposition to Petition for Writ of Certiorari have been served upon opposing counsel, John D. O'Hair, Wayne County Prosecuting Attorney, 1441 St Antoine Detroit, Michigan 48226, by placing said documents in a properly addresses envelope with postage pre-paid and placing said envelope in the United States mail box located here at the prison on July 15, 1992 1992.

Subscribed and sworn to before me

on 13th day of July 1992

Daniel Wozniak

Notary Public

DANIEL WOZNIAK
NOTARY PUBLIC, Jackson County, MI
My Commission Expires April 3, 1994

My Commission Expires:_____

Joseph Thomas
#140849

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF MICHIGAN,

Petitioner,

-Vs-

JOSEPH THOMAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Joseph Thomas
#140849
P.O. Box E
Jackson, Michigan 49204

COUNTERSTATEMENT OF

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS CONCLUSION WAS CONSISTENT WITH ILLINOIS v GATES, 462 US 213 (1983), IN DETERMINING THAT RESPONDENTS ARREST WAS IN VIOLATION OF THE FOURTH AMENDMENT AND DONE SO WITHOUT THE EXISTENCE OF PROBABLE CAUSE?

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED..... 1

INDEX TO AUTHORITIES..... 3

COUNTERSTATEMENT OF THE CASE..... 4-8

REASONS FOR DENYING THE WRIT..... 9-11

WHETHER THE COURT OF APPEALS CONCLUSION WAS CONSISTENT WITH ILLINOIS v GATES, 462 US 213 (1983), IN DETERMINING THAT RESPONDENT'S ARREST WAS IN VIOLATION OF THE FOURTH AMENDMENT AND DONE SO WITHOUT THE EXISTENCE OF PROBABLE CAUSE?

CONCLUSION..... 12

APPENDICES:

"A" People v Thomas, 191 Mich App 576 (1991)

"B" Court of Appeals, Slip Opinion #111910,

"C" Order of the Michigan Court of Appeals Denying Rehearing

"D" Order of the Michigan Supreme Court Denying Leave to Appeal

INDEX TO AUTHORITIES

Aguilar v Texas, 378 US 108; 84 S Ct 1509; 12 Led 2d 723 (1964)..... 10

Illinois v Gates, 462 US 213; 103 S Ct 2817; 76 Led 2d 257 (1983).... 2,3,9,10

Spinelli v United States, 393 US 410; 89 S Ct 584; 21 Led 2d 637 (1969) 10

Thomas v Foltz, 818 F2d 476 (CA 6, 1987)..... 6

District Court No. 84-CV-4740-DT..... 6

Supreme Court No. 87-89..... 6

United States v UpShaw, 488 F 2d 1218 (CA 5, 1971)..... 11

People v Oliver, 417 Mich 366 (1983)..... 9,10,11

People v Thomas, 191 Mich App 576 (1991)..... 11

CONSTITUTION

Constitutional Amendment 4..... 2,6,9, 10, 11

COUNTERSTATEMENT OF THE CASE

On December 7, 1974, respondent was sitting at home listening to the radio when five or six police officers suddenly entered his home, and before a word could be said, placed the respondent under arrest. The officers immediately proceeded to search the respondent's home and found a .38 revolver in one of the upstairs bedrooms.

At that time, respondent was sitting in the den area, the officers immediately placed the respondent under arrest. When respondent asked why was he being placed under arrest he was informed for a murder that occurred the previous night. The police presented a picture of another man that was not the respondent. When the respondent and his mother pointed out that the picture was not that of the respondent, the officer asked was his name Joseph Thomas, when respondent said yes, the officer said" then you are the one we want."

Respondent was handcuffed and taken out of his house and placed in a police car and taken to the fifteenth precinct. He was then tranfered to another car and taken down to police headquarters. There was never any statement made in route to police headquaters or at police headquaters. There was no written statement or constitutional right form signed by the respondent. Respondent stated that he had nothing to say and was exercising his right to remain silent. So the arresting officers got together and fabricated the so called statement that they claimed the respondent made in the police car.

Upon arriving at police headquaters, resondent's coat and shoes were taken from him. Respondent later learned that the police were claiming that the coat was supposed to have had some blood on it that matched that of the victum and that the shoe were suppose to have had strands of hair that were similar to that of the other victum.

The only problem with the set up was that the police forgot to find out exactly what coat respondent was wearing that night that this crime was supposed to have occurred. Petitioner's own witness gave testimony back in December of 1974, at the preliminary examination, that respondent was wearing an orange coat that night. And that same orange coat was also testified too during the course of the trial. (Vol. V, pg. 700)

The petitioner's own evidence conflicted and created a reasonable doubt as to exactly which coat the respondent was wearing that night.

The original trial was set for March 12, 1975, and after the jury was selected Charles Campbell, defense counsel,and Judge, James Del Rio got together and made a deal get the defendants to plead guilty. They obviously felt that the ends of justice would best be served by pleading the defendants rather than by going to trial. Because the petitioner didn't have any eye witnesses to the crime, plus they were fully aware of the fourth amendment violation, dealing with the illegal arrest and the lack of probable cause.

The deal as presented by judge, Del Rio and Campbell called for all three defendants to plead guilty. Judge, Del Rio, stated that he would call all three defendant back to court after three years and reduce their sentences. And Campbell assured the defendants that they could count on the Judge to Keep his word. That is what convinced respondent's co-defendants to accept the deal and plead to the reduced charge. Respondent didn't believe a word of what was said, and insisted that he be given a trial. It took maybe an hour of pressuring by Campbell and Judge, Del Rio to convince respondent to go along with the plan. But what really made respondent change his mind was when Campbell stated that he wouldn't represent the respondent at trial.

At the plea proceedings the respondent said that he "did not shot anyone." But the court accepted his plea anyway and subsequently sentenced him to fourty to one hundred years imprisonment.

After Judge, Del Rio failed to keep his part of the deal and was removed from the bench, respondent had no choice but to pursue his relief through the appellate process. In October of 1985, the Federal District Court granted the respondent an evidentiary hearing and in July of 1986, granted him a Writ of Habeas Corpus. (Docket No. 84-CV-4740-DT)

The Attorney General thereafter filed an appeal to the Sixth Circuit Court of Appeals and they affirmed the granting of the Writ of Habeas Corpus in a majority opinion, see, Thomas v Foltz, 818 F 2d 476 (CA 6, 1987).

The Attorney General then petitioned the United States Supreme Court for a Writ of Certiorari, which was denied on October 5, 1987. (Docket No. 87-89).

Prior to the commencement of trial, respondent moved the trial court to quash the information and to suppress the evidence that resulted from the illegal arrest and in violation of his fourth amendment rights.

At the hearing on the motion to suppress, officer Love, was asked where did he get information from which led him to believe that respondent was involved in the crime. He stated that he had an informant which he met with two hours after the crime and that this informant told him that a person by the name of "Hassan" who lived on Woodlawn was involved in the crime. And when asked who this informant was, he asked that he not be allowed to reveal his source. The anonomous source never said where he got that information from or if it was something that was told to him.

It was easy for the officer to say someone told this to him, for he had already seen the respondent's name in the file and knew that his middle name was "Hassan". So he conviently manufactured his anonomous informant in an effort to justify the

existence of probable cause. The officer went on to say that he saw a telotype which had the name Joseph Hassan Thomas on it along with two other suspects that were wanted for questioning.

The petitioner would like for this court to believe that there were various sources of information that was coming in that cooroborated the existence of probable cause. But none of those other sources were ever produced at any trial or any other proceeding which gives support for such a contention.

Now fourteen years or eighteen years after the crime, he want to argue that the police were actively pursuing other leads which would have inevitably lead to the respondent s arrest. Eighteen years ago, he wasn't even assigned to the case and probably wasn't even working with the prosecutor's office.

What the petitioner isn't saying is that they kept their main witness in jail for three days threathening and coercing them into giving an incriminating statement which would implicate the respondent in some kind of way. And the preliminary examination transcript and the trial transcript clearly shows this governmental misconduct, not to mention that all previous statements were recanted by the witnesses. Not one person said they saw the respondent do anything that constituted the elements of the crime charged.

The petitioner introduced evidence of a photograph of a single print that was supposed to be found upon a radio, that was found in the bushes down the street from the scence of the crime. No radio was ever produced at the trial.

What the petitioner has failed to point out is that none of the victums property was found in the respondent s home. Respondent did not live next door to the victums nor did any testimony place the respondent in the home of the deceases.

During the arguments on the motion to suppress, the trial judge, found that the respondent's arrest was" a bit premature". Even the petitioner admitted that

the arrest was without probable cause, but argued that that police would have eventually came up with some evidence, is mere speculation.

On June 15, 1988, the jury found the respondent guilty of two counts of first degree murder and two counts of felony murder. On July 19,1988, the trial judge dismissed the two counts of first degree murder and sentenced the respondent on the two counts of felony murder and sentenced him to life imprisonment on both counts.

On October 21, 1991, the Michigan Court of Appeals reversed and remanded the respondent's conviction to the trial court for a new trial in a published opinion holdin that respondent's arrest was illegal and without probable cause in violation of his fourth amendment rights.(Docket No. 111910) (Appendice B)

The petitioner appealed and filed a motion for rehearing which was denied on January 6, 1992. (Appendice C)

Petitioner thereafter, filed an Application for Leave to Appeal in the Michigan Supreme Court. That court also denied the petitioner's Application for Leave in an opinion dated April 8, 1992. (Appendice D)

REASONS FOR DENYING THE WRIT

WHETHER THE COURT OF APPEALS CONCLUSIONS WAS CONSISTENT WITH ILLINOIS v GATES, 462 US 213 (1983), IN DETERMINING THAT RESPONDENT'S ARREST WAS IN VIOLATION OF THE FOURTH AMENDMENT AND DONE SO WITHOUT THE EXISTENCE OF PROBABLE CAUSE?

The Michigan Court of Appeals in this case, specifically found that respondent's arrest was illegal and done so in violation of his fourth amendment rights to be secure from unreasonable searches and seizures.

The court found that the respondent had been arrested without a warrant and without the requisite of probable cause, in violation of his state and federal constitutional rights.

The court found that the only facts known to the officers prior to the respondent's arrest was that he was a know associate of two other suspects. And that one of the officer's had said that he received information from an anonomous informant that a person by the name of " Hassan" had been involved in the crime and that he lived on Woodlawn, which is the same street that respondent happens to live on. And that the respondent's middle name just so happens to be "Hassan".

The court held that, " this evidence does not establish probable cause to make an arrest." Because it does not establish respondent's involvement in the crime. The officer did not identify his source, or establish the credibility or reliability of his source. Nor was there any evidence to coorobarate the accuracy of the information supplied by the informant.

The Michigan Court of Appeals relied specifically upon the Michigan Supreme Court s decision in People v Oliver, 417 Mich 366, 374 (1983), which held that:

" Rumor and a known association with other suspects in a case, while certainly justifying investigation by the police into an individual's involvement in a crime do not establish probable cause to believe that the person was involved in the commission of the offense. See, Oliver, supra, at 366 (to establish probable cause based upon information supplied by an informant, there must be sufficient facts to permit an independent determination that the person supplying the information is reliable and that the information is based on something more substantial than a casual rumor). Accordingly, we conclude that the trial court clearly erred in finding that probable cause existed to arrest defenadnt."

The test which is presently under the federal constitution is whether is whether under the "totality of the circumstances," taking into account the informant's veracity, reliability and the basis of his knowledge, and whether it is reasonable to believe that the person arrested is probably guilty of the offense charged. Illinois v Gates, 462 US 213; 103 S Ct 2317; 76 Led 2d 257 (1983).

In interpeting the provisions of the Michigan Constitution, the Michigan Courts have followed the two prong test of Spinelli v United States, 393 US 410; 89 S Ct 584; 21 Led 2d 637 (1969) and Aguilar v Texas, 378 US 108; 84 S Ct 1509; 12 Led 723 (1964), on the matter of the federal constitutional law. Most tend to favor the " totality of the circumstances" on their approach to dealing with the question of probable cause.

Which ever the different courts choses, the fact remains that street talk alone cannot form the basis for probable cause, not standing alone.

The petitioner is arguing that despite the constitutional violation, he should be allowed to present evidence that is a diect result of "fruits of the poisonious tree". And that the exclusionary rule has no application in this case, and that inavitably the evidence would have been discovered.

If the police are allowed to bypass the procedural requirements of the fourth amendment's constitutional safeguards, as was done in this case, noone would be safe from the random searches and seizures, done so without the existence of probable cause.

In United States v UpShaw, 488 F 2d 1218 (CA 5, 1971), the court held that the requirements incorporated in the fourth amendment's exclusionary rule would be circumvented by overzealous governmental officials willing to make erronious affidavits in the hope that the results would yeild enough evidence to support suspicions and theories.

Nothing is more clear, that when our " forefather s of the constitution" constructed it, it designed the fourth amendment for the purpose of preventing wholesale intrusion on our personal security in the sancuary of our homes, unless a determination on probable cause has been attested too.

And lastly, this Honorable Court should be made aware that this petitioner has a long history of ommitting, misrepresenting and setting forth half truths in an attempt to mislead. He has used his influence in public office to mislead and misrepresent the interest of the people in the State of Michigan by colluding with agents in the Office of Reporter of Decisions to omit footnote number two from the published version of People v Thomas, 191 Mich App 576 (1991), see Appendice A and compare with the Court of Appeals , Slip Opinion, Appendice B.

Also note, that on page 7a of petitioner's petition for Writ of Certiorari, that he ommitted the crucial points in the court's findings, what the court actually said was as follows:

> " See, Oliver, supra, at 366 (to establish probable cause based upon information supplied by an informant, there must be sufficient facts to permit an independent determination that the person supplying the information is reliable and that the information is based on something more substantial than a casual rumor.)

For the reason set forth, this petition for writ of certiorari should be denied because it does not set forth a constitutional question worthy of this courts time and attention. Nor does he argue that the Court erred in its constitutional interpetation of the fourth amendment violation. Therefore this writ should be denied.

CONCLUSION

For these reasons, respondent respectfully requests that this Honorable Court deny the petition for a Writ of Certiorari.

Respectfully submitted,

Joseph Thomas

Joseph Thomas
#140849
P.O. Box E
Jackson, Michigan 49204

Dated: 7-14-94

"Exhibit" "APPENDIX A" "Exhibit"

PEOPLE v THOMAS

Docket No. 111910. Submitted June 12, 1991, at Detroit. Decided October 21, 1991, at 9:25 A.M.

Joseph Thomas was charged in the Recorder's Court for the City of Detroit with two counts of first-degree felony murder. He pleaded guilty of two counts of second-degree murder and was sentenced to forty to one hundred years in prison for each conviction. After exhausting all of his state appellate remedies and an unsuccessful attempt to withdraw his guilty plea in the trial court, the defendant successfully petitioned the federal district court for a writ of habeas corpus, resulting in the withdrawal of his guilty plea and a jury trial on the original two counts of first-degree felony murder. A jury found the defendant guilty of both counts, and the court, James E. Roberts, J., sentenced him to life in prison. He appealed, alleging that his arrest was unlawful and that certain physical evidence seized and statements he made following his arrest should have been suppressed. He also alleged that the prosecutor lacked the authority to try him on the first-degree murder charges in light of his earlier pleas of guilty of second-degree murder.

The Court of Appeals *held*:

1. The trial court clearly erred in finding that the police had probable cause to arrest the defendant at his residence without a warrant. However, the evidence developed by the police following and independent of his illegal arrest provided probable cause to have the defendant arrested subsequently, and a search conducted then would have yielded the physical evidence obtained. Therefore, the inevitable discovery doctrine can be applied to justify the admission of the physical evidence seized during and after the defendant's arrest.

2. Even though the defendant would have been arrested eventually, it was not ... same statements to the ... unlawful arrest. Therefore ... does not apply to justify ... statements, and the trial ... suppress that evidence. The ...

3. The defendant was pr... Although a rule adopted by ... defendant who pleaded gui... later had the plea set aside ... offense was in effect at th... original guilty plea, the rul... habeas corpus relief and w... charges. The rule was aban... 1963, 785.7(7)(d), now MC... defendant elects to withdr... trial on any charges that h... brought against the defend...

Reversed and remanded.

1. ARREST — SEARCHES AND SEIZURES.

To establish probable cause t... supplied by an informant ... permit an independent det... ing the information is re... based on something more ...

2. EVIDENCE — EXCLUSIONARY RU... TRINE — PHYSICAL EVIDENC...

Physical evidence obtained ... arrest may be admitted w... same evidence inevitably ... the unlawful police conduc...

3. EVIDENCE — EXCLUSIONARY R... TRINE — STATEMENTS.

The inevitable discovery doc... justify the admission into ... incriminating statements ... lowing an unlawful arrest ...

4. CRIMINAL LAW — GUILTY PLE...

If a defendant elects to with... trial on any charges that ... brought against the defen... (MCR 6.312).

REFERENCES

Am Jur 2d, Arrest §§ 44-49; Criminal Law §§ 501-506, 785; Evidence § 416.5.

Retrial on greater offense following reversal of plea-based conviction of lesser offense. 14 ALR4th 970.

What constitutes probable cause for arrest —Supreme Court cases. 28 L Ed 2d 978.

eventually, it was not shown that he would have made the same statements to the police that he made following his unlawful arrest. Therefore, the inevitable discovery doctrine does not apply to justify the admission of evidence of the statements, and the trial court clearly erred in failing to suppress that evidence. The defendant is entitled to a new trial.

3. The defendant was properly tried for first-degree murder. Although a rule adopted by the Supreme Court in 1973 that a defendant who pleaded guilty of a lesser-included offense and later had the plea set aside could not be tried for a greater offense was in effect at the time the defendant tendered his original guilty plea, the rule was abandoned before he obtained habeas corpus relief and was tried for the first-degree murder charges. The rule was abandoned when the Court enacted GCR 1963, 785.7(7)(d), now MCR 6.312, which provides that if a defendant elects to withdraw a plea, the case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered.

Reversed and remanded.

1. ARREST — SEARCHES AND SEIZURES — PROBABLE CAUSE — INFORMANTS.

To establish probable cause to arrest on the basis of information supplied by an informant, there must be sufficient facts to permit an independent determination that the person supplying the information is reliable and that the information is based on something more substantial than casual rumor.

2. EVIDENCE — EXCLUSIONARY RULE — INEVITABLE DISCOVERY DOCTRINE — PHYSICAL EVIDENCE.

Physical evidence obtained as a result of a defendant's unlawful arrest may be admitted where the prosecution shows that the same evidence inevitably would have been discovered despite the unlawful police conduct.

3. EVIDENCE — EXCLUSIONARY RULE — INEVITABLE DISCOVERY DOCTRINE — STATEMENTS.

The inevitable discovery doctrine ordinarily cannot be applied to justify the admission into evidence of a tainted confession or incriminating statements a defendant made to the police following an unlawful arrest.

4. CRIMINAL LAW — GUILTY PLEAS — WITHDRAWAL OF PLEA — TRIAL.

If a defendant elects to withdraw a plea, the case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered (MCR 6.312).

Frank J. Kelley, Attorney General, *Gay Secor Hardy*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jeffrey Caminsky*, Assistant Prosecuting Attorney, for the people.

Robert M. Morgan and Joseph Thomas, in propria persona, for the defendant on appeal.

Before: GILLIS, P.J., and SAWYER and REILLY, JJ.

PER CURIAM. Defendant was convicted, following a jury trial, of two counts of first-degree felony murder. MCL 750.316; MSA 28.548. He was sentenced to serve life in prison. He now appeals and we reverse.

The murders that gave rise to defendant's convictions occurred on December 6, 1974. Defendant was charged in those murders shortly after their commission, pleaded guilty of two counts of second-degree murder on March 12, 1975, and was sentenced to serve forty to one hundred years in prison for each conviction. Following various unsuccessful appeals to this Court and the Supreme Court and an attempt to withdraw his guilty plea in the trial court, defendant was able to obtain habeas corpus relief in 1987, resulting in the withdrawal of his guilty plea and his trial on the current charges. A trial was conducted in July 1988, resulting in defendant's present convictions.

Defendant raises a number of issues on appeal, one of which is dispositive. Defendant argues that his initial arrest was unlawful and, therefore, certain physical evidence seized following his arrest as well as statements made by defendant to the police following his arrest should have been suppressed. We agree that defendant was arrested

unlawfully and that the statements made by him to the police following that arrest should have been suppressed, but do not agree with defendant that the physical evidence should have been suppressed.

The police arrested defendant at his residence without a warrant. Defendant argues that the police lacked probable cause to make an arrest. We agree. A police officer may arrest without a warrant if he has reasonable (or probable) cause to believe that a felony has been committed and that the suspect committed the felony. MCL 764.15; MSA 28.874. Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). The only facts known to the police at the time of defendant's arrest concerning defendant's involvement in the murders were that an unnamed street source of one of the officers had said that the "word on the street" was that an individual named "Hassen" living on the same street as defendant was involved in the murders, that defendant's middle name is Hassen, and that defendant was wanted for questioning in the case because of his known association with two other suspects in the murders, General Dorsey and Jeffrey Dorsey (a neighbor of the victims).[1]

This evidence does not establish probable cause to make an arrest. The mere fact that defendant is a known associate of two suspects in the killings, while perhaps grounds to make defendant also a suspect, does little to establish defendant's involvement in the murders. Further, the fact that an

[1] A search of Jeffrey Dorsey's home earlier on the day of defendant's arrest had revealed property missing from the victims' home

ble cause. First, the officer declined to identify his source and did little to establish the source's credibility other than pointing out that the source was not in custody at the time of supplying the information, and there was no evidence to corroborate the accuracy of the source's information. Indeed, the officer's testimony was that the source told him that the "word on the street" was that a person by the name of Hassen who lived on the same street as defendant was involved in the murders. There is no indication that the source spoke from personal knowledge that Hassen was involved in the murders. Rather, the source merely indicated that he had heard that Hassen was involved. The individuals from whom the source got his information apparently were not even identified to the police officer, let alone identified in court.

Rumor and a known association with other suspects in a case, while certainly justifying investigation by the police into an individual's involvement in a crime, do not establish probable cause to believe that the person was involved in the commission of the offense. See *Oliver, supra* at 374 (to establish probable cause based upon information supplied by an informant, there must be sufficient facts to permit an independent determination that the person supplying the information is reliable and that the information is based on something more substantial than casual rumor). Accordingly, we conclude that the trial court clearly erred in finding that probable cause existed to arrest defendant.

The prosecutor also appears to argue that the

as a resul
would be
ous tree d
ble if the
evidence
despite the
the applic
Williams,
377 (1984).

Nix repr
was before
ion in the
S Ct 1232;
Court gran
that his r
Brewer, a t
Williams h
discovery o
from the pl
the abduct
gave Willia
"Christian
to William
would make
the parents
Christian b
abducted o
result of th

[1] The prosecu
issue, asserting
the trial court
would have bee
late review defe
develop more

statements made by defendant following his arrest as well as the physical evidence recovered in connection with defendant's arrest are admissible under the inevitable discovery exception to the exclusionary rule.[3] Although the evidence obtained as a result of defendant's unlawful arrest normally would be suppressed under the fruit of the poisonous tree doctrine, it nevertheless may be admissible if the prosecution can show that the same evidence inevitably would have been discovered despite the unlawful police conduct that results in the application of the exclusionary rule. *Nix v Williams*, 467 US 433; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

Nix represents the second time that that case was before the Supreme Court. In an earlier opinion in the case, *Brewer v Williams*, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), the Supreme Court granted Williams a new trial, concluding that his right to counsel had been violated. In *Brewer*, a ten-year-old girl had been murdered and Williams had been arrested for that murder before discovery of the body. While transporting Williams from the place of arrest back to Des Moines, where the abduction had occurred, one of the officers gave Williams what has become known as the "Christian burial speech." The officer pointed out to Williams that a snowstorm was coming that would make it impossible to find the body and that the parents of the victim should be entitled to a Christian burial for their daughter, who had been abducted on Christmas Eve and murdered. As a result of the speech, Williams directed the officers

[3] The prosecutor's brief contains exactly one sentence regarding this issue, asserting that defendant's arrest was inevitable. Additionally, the trial court in ruling on this issue did note that "it [the arrest] would have been done anyhow." While we address this issue, appellate review certainly was not enhanced by the prosecutor's failure to develop more fully his argument in this area.

Footnote # 2 Omitted From the Court of Appeals Slip Opinion

to the body. Having concluded that the conduct of the officers violated Williams' right to counsel, the Supreme Court concluded that incriminating statements themselves, as well as any testimony by the police concerning the fact that Williams had led them to the body, could not be admitted into evidence.

The Court, however, left open the question whether evidence of where the body was found as well as the condition of the body could be admitted on the theory that the body would have been discovered anyway. *Id.* at 406, n 12. On retrial, the state trial court found that the body inevitably would have been discovered and allowed the evidence of the discovery of the body and the condition of the body at trial. Ultimately, the United States Supreme Court concurred in this conclusion in *Nix*, concluding that the body inevitably would have been discovered because an intensive search for the body had been in progress approximately 2½ miles from where the body was found and had been proceeding to the area where the body was located.

In the case at bar, the prosecutor suggests, and the trial court concluded, that defendant inevitably would have been arrested on the basis of evidence that was developed by the police following defendant's arrest and independent of the arrest. Specifically, the police obtained statements from witnesses that placed defendant in the area of the homicides before the homicides, and fingerprint analysis of latent prints recovered from property stolen from the victims' house matched defendant's fingerprints on a fingerprint card the police had from a prior arrest of defendant. We agree that this evidence, combined with the knowledge the police already had concerning defendant's known involvement with the Dorsey brothers and

the information obtained by the street informant, would have yielded probable cause to arrest defendant at a subsequent time. Similarly, we are satisfied that a search would have been conducted at that subsequent time that would have yielded the physical evidence obtained. Accordingly, the inevitable discovery doctrine can be applied to justify the admission into evidence of the physical evidence seized during and after defendant's arrest. To this extent, the trial court's decision was not clearly erroneous. *People v Martinez*, 187 Mich App 160, 171; 466 NW2d 380 (1991).

This, however, does not resolve the question whether evidence of defendant's statements to the police should have been suppressed. The prosecutor cites no case in which the inevitable discovery doctrine has been applied to a defendant's statements.[3] On the other hand, defendant has cited no case in which the application of the inevitable discovery doctrine to statements has been considered. Our own research of the issue has not revealed any Michigan cases that have addressed this issue, and few cases from foreign jurisdictions as well. The only case that we have discovered that squarely addresses the issue is *Unger v State*, 640 P2d 151 (Alas App, 1982). In *Unger*, the Alaska Court of Appeals noted that "a confession cannot normally be considered the type of evidence that inevitably will be 'discovered' by legal, predictable police procedures." *Id.* at 159. Indeed, the Alaska court noted that the inevitable discovery doctrine permits the state to introduce evidence that is the result of an illegal search or seizure upon a showing that the government undoubtedly would have discovered the tainted evi-

[3] In fact, the only inevitable discovery case cited by the prosecutor is *Nix*, *supra*, which, of course, concerned the inevitable discovery of physical evidence.

dence by lawful means, citing Kamisar, LaFave & Israel, Modern Criminal Procedure (4th ed, 1974), p 702. *Unger, supra* at 158.

Also of interest is *State v McKendall*, 36 Or App 187; 584 P2d 316 (1978), which was relied upon in part by the *Unger* court, wherein the Oregon Court of Appeals declined to apply the inevitable discovery doctrine to the admission of a confession. Although the court did not explicitly state that the inevitable discovery doctrine does not apply to confessions, the court did note that there was nothing in the record to support a finding that the defendant's statement inevitably would have been made and, therefore, the exception did not apply. *Id.* at 193. Similarly, in *State v Anderson*, 160 Wis App 2d 307; 466 NW2d 201 (1991), the Wisconsin Court of Appeals rejected the application of the inevitable discovery doctrine to find a confession admissible, but did so on the basis that the facts did not support a finding of inevitable discovery without directly considering the question whether the inevitable discovery doctrine applies to confessions. This was also the result in an earlier Oregon Court of Appeals decision, *State v Paz*, 31 Or App 851; 572 P2d 1036 (1977), in which the court concluded that the defendant's statements would not have been inevitably discovered and, therefore, should not have been admitted. The court did not, however, address the threshold question whether the inevitable discovery doctrine is applicable to confessions or other statements by a defendant.

We agree with the Alaska court that the inevitable discovery doctrine ordinarily cannot be applied to justify the admission into evidence of a tainted confession. Even though it can be shown that defendant eventually would have been arrested, that does not lead to the conclusion that it was inevitable, without speculation, that defendant

would have made the
police that he did in
unlawful arrest. It is
conclude that, followin
defendant necessarily
statements to the pol
Defendant could have
Dorsey brothers and,
have consulted counse
him to remain silent;
have considered the p
and the need to remai
ter, the manner in whi
could effect defendan
statement. See *Unger*,
that a person would
under different circum
both the ability to re
ascertain why he was
ment in the first place
tion concerning whet
extend to different cir
would be beyond the
cutor or the court to p

We stop short, howe
table discovery doctri
justify the admission
dant because we allow
fact situation could
appropriate to apply
would seem that such

[4] For example, had, unkn
officer in the department ob
and arrived at defendant's r
conducted without a warrant.
is no reasonable distinction b
an arrest a few moments lat
statements made by defendar
be admissible. Obviously, thi
certainly is not the case pres

would have made the same statements to the police that he did in fact make following his unlawful arrest. It is simply too speculative to conclude that, following the passage of some time, defendant necessarily would have made the same statements to the police that he made initially. Defendant could have learned of the arrest of the Dorsey brothers and, with time to reflect, could have consulted counsel who would have advised him to remain silent; defendant on his own could have considered the possibility of being arrested and the need to remain silent; and, for that matter, the manner in which the arrest was conducted could effect defendant's willingness to make a statement. See *Unger, supra* at 159. To conclude that a person would make the same statement under different circumstances requires, in essence, both the ability to read the defendant's mind to ascertain why he was willing to make the statement in the first place and a degree of prognostication concerning whether that willingness would extend to different circumstances, which ordinarily would be beyond the power of either the prosecutor or the court to perform.

We stop short, however, of saying that the inevitable discovery doctrine can never be applied to justify the admission of a statement by a defendant because we allow for the possibility that some fact situation could arise in which it would be appropriate to apply the doctrine.[4] However, it would seem that such cases would be rather unu-

[4] For example, had, unknown to the arresting officers, another officer in the department obtained a warrant for defendant's arrest and arrived at defendant's residence moments after the arrest was conducted without a warrant, it might be valid to conclude that there is no reasonable distinction between the arrest without a warrant and an arrest a few moments later with the warrant and, therefore, any statements made by defendant after the arrival of the warrant would be admissible. Obviously, this is a rather unique fact situation and certainly is not the case presented here.

sual and would involve unique circumstances. In any event, the prosecutor has made no showing in this case that there is any reason to believe that defendant inevitably would have made the same statements following a subsequent lawful arrest made sometime after the unlawful arrest in the case at bar. Accordingly, we conclude that the trial court clearly erred in failing to suppress from evidence statements made by defendant following his arrest.[5]

For these reasons, we conclude that the trial court erred in denying the suppression of evidence of defendant's statements. Therefore, defendant is entitled to a new trial.[6]

---

[5] We do note that this does not preclude the proof of the facts contained within the statement from sources other than the statement itself. See *McKendall, supra* at 193. Indeed, this is the result obtained in *Brewer* and *Nix*, with evidence of the statements by Williams being suppressed, but the content of those statements, the location of the victim's body, being admissible through other evidence.

[6] We briefly consider the prosecutor's argument that defendant has waived consideration of this issue by not having raised it at the time of his original plea. The prosecutor's argument in this regard is wholly without merit. The case primarily relied upon by the prosecutor in support of this argument, *People v Brady*, 139 Mich App 688; 363 NW2d 8 (1984), is simply not on point. In *Brady*, the defendant brought a series of appeals and motions for new trial from the same conviction, raising his issues piecemeal rather than in the same proceeding. In the case at bar, this matter is before us on defendant's direct appeal from his conviction. Moreover, the issue of the lawfulness of defendant's arrest did not arise at a prior trial inasmuch as no prior trial had been conducted, because defendant's prior conviction was obtained by plea. The other cases cited by the prosecutor in support of this argument are similarly not on point. They involve the requirement that an objection be made at trial in order to preserve an issue for appeal and the law-of-the-case doctrine, neither of which is applicable in this case. Defendant did preserve at trial the issue regarding the lawfulness of his arrest, and the law-of-the-case doctrine is inapplicable inasmuch as this Court has not previously ruled regarding the issues of the lawfulness of defendant's arrest or the need to suppress evidence derived from that unlawful arrest. The prosecutor's position might have had some merit had defendant's prior conviction followed a trial and had defendant taken an appeal from that conviction and not challenged the lawfulness of his arrest or the admission of the evidence obtained from that arrest. In such a circumstance, it might be appropriate to conclude that defendant

One other issue r
consideration beca
whether a new tr
argues that the pro
try defendant on th
light of his earlier
murder. Defendant
Court in 1973 adopt
pleaded guilty of
later had the plea s
greater offense than
People v McMiller,
(1973). The *McMill*
Court in *People v*
NW2d 132 (1978).
abandoned the *Mc*
GCR 1963, 785.7(7
which provided tha
draw a plea, the ca
charges that had be
brought against the
been entered. See 4
may now be found
which recognizes th
prohibitions establi
ton. Mich Ct R, p I
rule was in effect a
his original guilty
before defendant ob
was tried for the fi
cordingly, we concl
to a trial for the hi
no longer being app

Defendant also r
tal brief filed in p

waived the issue in furt
reversal had been obtaine
Midkiff, 186 Mich App 191

One other issue raised by defendant merits brief consideration because it affects the question whether a new trial is appropriate. Defendant argues that the prosecutor lacked the authority to try defendant on the first-degree murder charge in light of his earlier plea of guilty of second-degree murder. Defendant is correct that the Supreme Court in 1973 adopted a rule that a defendant who pleaded guilty of a lesser-included offense and later had the plea set aside could not be tried for a greater offense than that to which he had pleaded. *People v McMiller*, 389 Mich 425; 208 NW2d 451 (1973). The *McMiller* rule was reaffirmed by the Court in *People v Thornton*, 403 Mich 389; 269 NW2d 192 (1978). However, the Supreme Court abandoned the *McMiller* rule by its adoption of GCR 1963, 785.7(7)(d), effective March 1, 1984, which provided that if a defendant elects to withdraw a plea, the case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered. See 418 Mich lxxxvi. That provision may now be found in MCR 6.312, the staff note to which recognizes that the court rule removes the prohibitions established by *McMiller* and *Thornton*. Mich Ct R, p R 6.3-7. Although the *McMiller* rule was in effect at the time defendant tendered his original guilty plea, it had been abandoned before defendant obtained habeas corpus relief and was tried for the first-degree murder charges. Accordingly, we conclude that defendant was subject to a trial for the higher charge, the *McMiller* rule no longer being applicable.

Defendant also raises two issues in a supplemental brief filed in propria persona. In light of our

waived the issue in further proceedings regarding the case if a reversal had been obtained on other grounds. See, e.g., *VanderWall v Midkiff*, 186 Mich App 191; 463 NW2d 219 (1990).

resolution of the first issue, we need not consider the issues raised in that brief.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

GREAT LAKES AMERICAN
CITIZENS INSU

Docket No. 129231. Submitted
Decided October 21, 1991,

Great Lakes American Life
surer of Cruz Paiz, brough
against Paiz and his no-fa
pany, seeking a declarat
subrogation it could right
Paiz from a motorist invo
resulted in his injury. G
expenses because Citizens
for the coordination of
settlement of his action
David Soet, J., granted
Lakes appealed.

The Court of Appeals *he*

Benefits paid by a healt
in an automobile accide
insurance policy that pro
substitute for no-fault p
otherwise payable. The su
with respect to any tort
MCL 500.3116; MSA 24.1
reimbursement of perso
sured's third-party tort
accidents occurring out o
tional torts. Section 3116
ment from an insured's
ery is for noneconomic lo
insurance benefits in exc

Affirmed.

Hibbs, Welch & M
Farrell, Karen Russell
ski), for Great Lakes
Company.

' APPENDICE 3 '

DEFENDANT'S COPY

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH THOMAS,

Defendant-Appellant.

October 21, 1991
9:25 a.m.
FOR PUBLICATION

No. 111910

Before: Gillis, P.J., and Sawyer and Reilly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree felony murder. MCL 750.316; MSA 28.548. He was sentenced on his convictions to serve life in prison. He now appeals and we reverse.

The murders which give rise to defendant's convictions occurred on December 6, 1974. Defendant was charged in those murders shortly after their commission and pled guilty to two counts of second-degree murder on March 12, 1975, and was sentenced to serve forty to one hundred years in prison on each count. Following various unsuccessful appeals to this Court and the Supreme Court and an attempt to withdraw his guilty plea in the trial court, defendant was able to obtain habeas corpus relief in 1987, resulting in the withdrawal of his guilty plea and his trial on the instant charges. A trial was conducted in July 1988, resulting in defendant's instant convictions.

Defendant raises a number of issues on appeal, one of which is dispositive. Defendant argues that his initial arrest was unlawful and, therefore, certain physical evidence seized following his arrest as well as statements made by defendant to the police following his arrest should have been suppressed. We agree that defendant was unlawfully arrested and that the statements made by him to the police following that arrest should have been suppressed, but do not agree with defendant that the physical evidence should have been suppressed.

The police arrested defendant at his residence without a warrant. Defendant argues that the police lacked probable cause to make an arrest. We agree. A police officer may arrest without a warrant if he has reasonable (or probable) cause to believe that a felony has been committed and that the suspect committed the felony. MCL 764.15; MSA 28.874. Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair minded person of average intelligence to believe that the suspected person has committed a felony. People v Oliver, 417 Mich 366, 374; 338 NW2d 167 (1983). The only facts known to the police at the time of defendant's arrest concerning defendant's involvement in the murders were that an unnamed street source of one of the officers had said that the "word on the street" was that an individual named "Hassen" living on the same street as defendant was involved in the murders, that defendant's middle name is Hassen, and that defendant was wanted for questioning in the case because of his known association with two other suspects in the murders, General Dorsey and Jeffrey Dorsey (a neighbor of the victims).[1]

This evidence does not establish probable cause to make an arrest. The mere fact that defendant is a known associate of two suspects in the killing, while perhaps grounds to make defendant also a suspect, does little to establish defendant's involvement in the murder. Further, the fact that an unidentified informant told an officer that the "word on the street" was that an individual with the same name as defendant's middle name

was involved in the crime also fails to establish probable cause. First, the officer declined to identify his source, and did little to establish the source's credibility other than pointing out that the source was not in custody at the time of supplying the information, nor was there any evidence to corroborate the accuracy of the source's information. Indeed, the officer's testimony was that the source told him that the "word on the street" was that a person by the name of Hassen who lived on the same street as defendant was involved in the murder. There is no indication that the source spoke from personal knowledge that Hassen was involved in the murder. Rather, the source merely indicated that he had heard that Hassen was involved, from individuals who apparently were not even identified to the police officer, let alone whose identities were divulged in court.

Rumor and a known association with other suspects in a case, while certainly justifying investigation by the police into an individual's involvement in a crime, do not establish probable cause to believe that the person was involved in the commission of the offense. See Oliver, supra at 366 (to establish probable cause based upon information supplied by an informant, there must be sufficient facts to permit an independent determination that the person supplying the information is reliable and that the information is based on something more substantial than casual rumor). Accordingly, we conclude that the trial court clearly erred in finding that probable cause existed to arrest defendant.[4]

The prosecutor also appears to argue that the statements made by defendant following his arrest as well as the physical evidence recovered in connection with defendant's arrest are admissible under the inevitable discovery exception to the exclusionary rule.[5] While the evidence obtained as a result of defendant's unlawful arrest would normally be suppressed under the fruit of the poisonous tree doctrine, it may nevertheless be admissible if the prosecution can show that the same evidence would have been inevitably discovered despite the unlawful police conduct which results in the application of the exclusionary rule. Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

Nix represents the second time that that case was before the Supreme Court. In an earlier opinion in the case, Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), the Supreme Court granted Williams a new trial, concluding that his right to counsel had been violated. In Brewer, a ten-year-old girl had been murdered and Williams had been arrested for that murder prior to the discovery of the body. While transporting Williams from the place of arrest back to Des Moines, where the abduction had occurred, one of the officers gave Williams what has become known as the "Christian burial speech." The officer pointed out to Williams that a snow storm was coming which would make it impossible to find the body and that the parents of the victim should be entitled to a Christian burial for their daughter who had been abducted on Christmas Eve and murdered. As a result of the speech, Williams directed the officers to the body. Having concluded that the conduct of the officers violated Williams' right to counsel, the Supreme Court concluded that incriminating statements themselves, as well as any testimony by the police concerning the fact that Williams had led them to the body, could not be admitted into evidence.

The Court, however, left open the question whether evidence of where the body was found as well as the condition of the body could be admitted on the theory that the body would have been discovered in any event. Id. at 406, n 12. On retrial, the state trial court found that the body would have inevitably been discovered and allowed the evidence of the discovery of the body and the condition of the body at trial. Ultimately, the United States Supreme Court concurred in this conclusion in Nix, concluding that the body would have inevitably been discovered based upon the fact that an intensive search for the body was in place approximately 2-1/2 miles from where the body was, proceeding to the area where the body was located.

In the case at bar, the prosecutor suggests, and the trial court had concluded, that defendant inevitably would have been arrested based upon evidence which was developed by the police following defendant's arrest and independent of defendant's arrest. Specifically, the police obtained statements from witnesses that placed defendant in the area of the homicide at sometime before the homicide and fingerprint analysis of latent prints recovered from property stolen from the victim's house matched defendant's fingerprints, with the police having possession of a fingerprint card for defendant from a prior arrest. We agree that this evidence, combined with the knowledge the police already had concerning defendant's known involvement with the Dorsey brothers and the information obtained by the street informant, would yield probable cause to have arrested defendant at that subsequent time. Similarly, we are satisfied that a search

would have been conducted at that subsequent time which would have yielded the physical evidence obtained. Accordingly, the inevitable discovery doctrine can be applied to justify the admission into evidence of the physical evidence seized at the time of defendant's arrest and subsequent to that arrest. To this extent, the trial court's decision was not clearly erroneous. People v Martinez, 187 Mich App 160, 171; 466 NW2d 380 (1991).

This, however, does not resolve the question whether defendant's statements to the police should have been suppressed from evidence. The prosecutor cites no case in which the inevitable discovery doctrine has been applied to a defendant's statements.[4] On the other hand, defendant has cited no case in which the application of the inevitable discovery doctrine to statements has been considered. Our own research of the issue did not reveal any Michigan cases which have addressed this issue, and few cases from foreign jurisdictions as well. The only case which we have discovered which squarely addresses the issue is Unger v State, 640 P2d 151 (Alas App, 1982). In Unger, the Alaska Court of Appeals noted that "a confession cannot normally be considered the type of evidence that inevitably will be 'discovered' by legal, predictable police procedures." Id. at 159. Indeed, the Alaska court noted that the inevitable discovery doctrine permits the state to introduce evidence that is the result of an illegal search or seizure upon a showing that the government would undoubtedly have discovered the tainted evidence by lawful means, citing Kamisar, LaFave & Israel, Modern Criminal Procedure (4th ed, 1974), p 702. Unger, supra at 158.

Also of interest is State v McKendall, 36 Or App 187; 584 P2d 316 (1978), which was relied upon in part by the Unger court, wherein the Oregon Court of Appeals declined to apply the inevitable discovery doctrine to the admission of a confession. Although the court did not explicitly state that the inevitable discovery doctrine does not apply to confessions, the court did note that there was nothing in the record to support a finding that the defendant's statement inevitably would have been made and, therefore, the exception did not apply. Id. at ___; 584 P2d 320. Similarly, in State v Anderson, 160 Wis App 2d 307; 466 NW2d 201 (1991), the Wisconsin Court of Appeals rejected the application of the inevitable discovery doctrine to find a confession admissible, but again did so on the basis that the facts did not support a finding of inevitable discovery without direct consideration of the question whether the inevitable discovery doctrine applies to confessions. This was also the result in an earlier Oregon Court of Appeals decision, State v Paz, 31 Or App 851; 572 P2d 1036 (1977), in which the court concluded that the defendant's statements would not inevitably have been discovered and, therefore, should not have been admitted. The court did not, however, address the threshold question of whether the inevitable discovery doctrine is applicable to confessions or other statements by a defendant.

We agree with the Alaska court that the inevitable discovery doctrine cannot ordinarily be applied to justify the admission into evidence of a tainted confession. Even though it can be shown that defendant would eventually have been arrested, that does not lead to the conclusion that it is inevitable, without speculation, that defendant would have made the same statements to the police that he did in fact make following his unlawful arrest. It is simply too speculative to conclude that, following the passage of some time, defendant would necessarily have made the same statements to the police that he made initially. Defendant may have learned of the arrest of the Dorsey brothers and, with time to reflect, have consulted counsel who would have advised him to remain silent, or on his own considered the possibility of being arrested and the need to remain silent, and, for that matter, the manner in which the arrest was conducted could impact on defendant's willingness to make a statement. See Unger, supra at ___; 640 P2d 159. To conclude that a person would make the same statement under different fact situations requires, in essence, both the ability to read the defendant's mind to ascertain why he was willing to make the statement in the first place and a degree of prognostication concerning whether that willingness would extend to a different fact situation which would ordinarily be beyond the power of either the prosecutor or the court to perform.

We stop short, however, of saying that the inevitable discovery doctrine can never be applied to justify the admission of a statement by the defendant as we allow for the possibility that some such fact situation could arise in which it would be appropriate to apply the doctrine.[5] However, it would seem that such cases would be rather unusual and would involve unique factual situations. In any event, the prosecutor has made no showing in this case that there is any reason to believe that defendant would inevitably have made the same statements following a subsequent lawful arrest made sometime after the unlawful arrest in the case at bar.

Accordingly, we conclude that the trial court clearly erred in failing to suppress from evidence statements made by defendant following his arrest.[6]

For the above reasons, we conclude that the trial court erred in denying the suppression of defendant's statements. Therefore, defendant is entitled to a new trial.[7]

One other issue raised by defendant merits brief consideration as it affects the question whether retrial is appropriate. Defendant argues that the prosecutor lacked the authority to retry defendant on the first-degree murder charge in light of his earlier plea to second-degree murder. Defendant is correct that the Supreme Court in 1973 adopted a rule that a defendant who pleads guilty to a lesser-included offense and later has the plea set aside may not be tried on a greater offense than that to which he pled. People v McMiller, 389 Mich 425; 208 NW2d 451 (1973). The McMiller rule was reaffirmed by the Court in People v Thornton, 403 Mich 389; 269 NW2d 192 (1978). However, the Supreme Court abandoned the McMiller rule by its adoption of GCR 1963, 785.7(7)(d), effective March 1, 1984, which provides that if a defendant elects to withdraw a plea, the case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered. See 418 Mich lxxxvi. That provision may now be found in MCR 6.312, the staff note to which recognizes that the court rule removes the prohibitions established by McMiller and Thornton. Michigan Court Rule 6.312, Note, R 6.3-7. Although McMiller was in effect at the time defendant tendered his original guilty plea, it had been abandoned prior to the time defendant obtained habeas corpus relief and was retried on the first-degree murder charges. Accordingly, we conclude that defendant was subject to retrial on the higher charge, the McMiller rule no longer being applicable.

Defendant also raises two issues in a supplemental brief filed in propria persona. In light of our resolution of the first issue, we need not consider the issues raised in that brief.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ John H. Gillis
/s/ David H. Sawyer
/s/ Maureen Pulte Reilly

[1] A search of Jeffrey Dorsey's home earlier in the day of defendant's arrest had revealed property missing from the victim's home.

[2] We also note, though not argued by the parties, that even the existence of probable cause would not alone justify defendant's arrest since he was arrested in his residence without a warrant. Absent exigent circumstances, the police must possess an arrest warrant before entering a suspect's residence to effect an arrest. Oliver, supra at 376, citing Payton v New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). We do note that the police were granted admittance to defendant's house by his mother, with whom defendant apparently lived, but we do not speculate on whether the mother's permission to enter the house was sufficient to justify arresting defendant in his residence without a warrant.

[3] The prosecutor's brief spends exactly one sentence on this issue, asserting that defendant's arrest was inevitable. Additionally, the trial court in ruling on this issue did note that "it [the arrest] would have been done anyhow." While we address this issue, appellate review was certainly not enhanced by the prosecutor's failure to more fully develop his argument in this area.

[4] In fact, the only inevitable discovery case cited by the prosecutor is Nix, supra, which, of course, concerned the inevitable discovery of physical evidence.

[5] For example, had, unknown to the arresting officers, another officer in the department obtained a warrant for defendant's arrest and arrived at defendant's residence moments after the warrantless arrest was conducted, it might be valid to conclude that there is no reasonable distinction between the arrest without a warrant and an arrest a few moments later with the warrant and, therefore, any statements made by defendant

subsequent to the arrival of the warrant would be admissible. Obviously, this is a rather unique fact situation and certainly is not the case presented here.

[6] We do note that this does not preclude the proof of the facts contained within the statement from sources other than the statement itself. See McKendall, supra at ___; 584 P2d 320. Indeed, this is the result obtain in Brewer and Nix, with the statements by Williams being suppressed from evidence, but the content of those statements, the location of the victim's body, being admissible through other evidence.

[7] We briefly consider the prosecutor's argument that defendant has waived consideration of this issue by not having timely raised it at the time of his original plea. The prosecutor's argument in this regard is wholly without merit. The case primarily relied upon by the prosecutor in support of this argument, People v Brady, 139 Mich App 688; 363 NW2d 8 (1984), is simply not on point. In Brady, the defendant sought a series of appeals and motions for new trial from the same conviction, raising his issues piecemeal rather than in the same proceeding. In the case at bar, this matter is before us on defendant's direct appeal from his conviction. Moreover, the issue of the lawfulness of defendant's arrest did not arise at a prior trial inasmuch as no prior trial had been conducted, since defendant's prior conviction was obtained by plea. The other cases cited by the prosecutor in support of this argument are similarly not on point, involving the requirement that an objection be made at trial in order to preserve an issue for appeal as well as the law-of-the-case doctrine, neither of which are applicable to this case. Defendant did preserve the issue of the lawfulness of his arrest at trial and the law-of-the-case doctrine is inapplicable inasmuch as this Court has not previously ruled on the issue of the lawfulness of defendant's arrest or the need to suppress evidence derived from that unlawful arrest. The prosecutor's position might have some merit had defendant's prior conviction followed a trial and defendant took an appeal from that conviction and did not challenge the lawfulness of his arrest or the admission of the evidence obtained from that arrest. In such a circumstance, it might be appropriate to conclude that defendant waived the issue in further proceedings of the case if a reversal had been obtained on other grounds. See, e.g., VanderWall v Midkiff, 186 Mich App 191; 463 NW2d 219 (1990).

"APPENDICE 1"

C rt of Appeals, State of M igan

ORDER

People of Michigan v Joseph Thomas

Docket # 111910

L. C. # 74-009753

John H. Gillis
Presiding Judge

David H. Sawyer

Maureen Pulte Reilly

Judges

The Court orders that the motion for rehearing is DENIED.

J.H. Gillis

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on

JAN 6 1992
Date

Daniel F. Walsh
Chief Clerk

" APPENDICE D"

Order

Entered: April 8, 1992

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

93099

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH THOMAS,

Defendant-Appellee.

SC: 93099
COA: 111910
LC: 74-09753

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Boyle, J., would grant leave to appeal.

20402

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

April 8, 1992 Corbin R Davis

Clerk